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No. 84-203

In the Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH W. BEHREND AND
BEHREND, ARONSON AND MORROW, PETITIONERS

v.

ALTON GODWIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners seek review of the court of appeals' holding that they are equitably estopped from receiving attorney's fees and costs in excess of the $281,250 that they already have been awarded in this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*

1. Petitioners are attorneys who were retained by respondents Alton and Karen Godwin in connection with a severe injury sustained by Mr. Godwin during surgery in a Veterans Administration (VA) hospital (Pet. App. 2a). The Godwins initially signed a power of attorney guaranteeing petitioners a contingent fee of 40% of all funds recovered through prosecution of the Godwins' claims (*ibid.*).

Petitioners accordingly filed suit on behalf of the Godwins in Pennsylvania state court against the surgeon involved in the operation (Pet. App. 3a). The United States

subsequently substituted itself as defendant, removed the case to the United States District Court for the Western District of Pennsylvania pursuant to 38 U.S.C. 4116, and impleaded several third party defendants (Pet. App. 3a). After the action had been removed to federal court, petitioners sent the Godwins a letter stating that their fee would "be limited to 25 percent of the total gross recovery" because "your damages are, indeed, more substantial than was understood at the time the Power of Attorney was signed" (Pet. App. 3a). The letter failed to inform the Godwins that the fee reduction was mandated by 28 U.S.C. 2678, however.[1]

A settlement eventually was negotiated that provided the Godwins with a cash payment of $1,125,000 and Mr. Godwin with lifetime medical care and treatment at a VA hospital. Petitioners drew up and presented to the Godwins a sheet outlining the terms of the proposal. This sheet projected a financial value for Mr. Godwin's future medical care and, based upon this estimate, calculated the full value of the settlement at $2,091,000. Petitioners listed their fee as $522,750, or 25% of the settlement figure, and also provided for payment upon settlement of approximately $60,000 in expenses. The Godwins ultimately decided to accept the government's offer, and they signed the settlement sheet.[2]

At the settlement conference the district judge directed that "no claim or demand for counsel fees may be made for any service rendered by the Veterans Administration in the

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[1]Cases removed to federal court under 38 U.S.C. 4116 are treated as FTCA actions. 38 U.S.C. 4116(c). Attorney's fees in FTCA cases are limited to 25% of the judgment or settlement by 28 U.S.C. 2678.

[2]Before accepting the offer Mrs. Godwin telephoned the district judge; she informed him that the Godwins were receiving bad advice and that petitioners' unreasonably high fees would prevent the Godwins from receiving a substantial cash award. The judge responded that he would address the matter at a scheduled conference.

future," and he several times stated that counsel fees should be $281,250, or 25% of the cash settlement of $1,125,000 (Pet. App. 5a-6a, 15a). Petitioners did not object to these statements or make any reference to the settlement sheet that had been signed a month earlier, declaring only that "we are abiding by, of course, the statute, the $281,250" (Pet. App. 6a).

Two days after the settlement conference, the court issued an order directing payment of $281,250 to petitioners. Five days later, however, petitioners notified the court that they intended to press a claim for $522,750, basing this demand on "the present worth of those [future] medical expenses," rather than "on [the] future medical expenses" themselves (Pet. App. 7a). This claim was rejected by the court (*ibid.*).

Petitioners then filed a motion for reconsideration and a petition for costs, both of which were denied by the district court. The court explained that the original power of attorney was voidable by the Godwins because the 40% contingent fee violated 28 U.S.C. 2678 (Pet. App. 7a-8a). The court also ruled that the fee agreement outlined in the settlement sheet lacked consideration and therefore did not constitute an enforceable contract, and that the agreement was in any event unenforceable as contrary to public policy (Pet. App. 8a).[3] An award of costs was found improper because petitioners had no contract for reimbursement with the Godwins.[4] In all, the district judge characterized counsel's conduct as the most "egregious example of overreaching by a

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[3]The court explained that the contingent fee arrangement had been obtained in violation of DR 2-106(a) of the Model Code of Professional Responsibility (1983) (Pet. App. 8a).

[4]The court also declared that the denial of costs "is an appropriate sanction for a lawyer who intentionally attempts to extract an illegal fee from a person to whom Congress and the Supreme Court have accorded special consideration" (Pet. App. 8a).

lawyer" that he had encountered "in 10 years of public service and 22 years at the bar" (Pet. App. 8a).

On petitioners' appeal the court of appeals affirmed the denial of a further fee award. The court of appeals held that the doctrine of equitable estoppel barred petitioners from seeking a larger award of fees both because they had stated their intention to accept the $281,250 award, and because they specifically had denied the existence of a claim for fees based on future medical services (Pet. App. 15a-17a). The Godwins had relied on this disclaimer by beginning negotiations for the purchase of an annuity with their cash settlement (*id.* at 15a n.4).[5] The court of appeals also held that any claim for costs against the United States had been extinguished by the settlement agreement, which provided the "full settlement and satisfaction of any and all claims" (Pet. App. 18a), while the Godwins were not contractually obligated to reimburse petitioners for costs. In reaching these conclusions the court of appeals explained that the existence of equitable estoppel made unnecessary a determination whether, as the district court originally had ruled, an attorney's fee may not be based upon the value of the future services component of a settlement (Pet. App. 14a, 16a).

2. Petitioners' suggestion that the decision below involves novel issues relating to the award of attorney's fees is incorrect. To the contrary, the court of appeals simply and properly held that the doctrine of equitable estoppel barred an award of additional fees, given petitioners' stated willingness to abide by the $281,250 award, their less than forthright dealings with the Godwins, the Godwins' reliance

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[5]The court of appeals observed that the status of the contractual relationship between petitioners and the Godwins was "ambiguous" because petitioners had failed to discuss the fee arrangements fully with their clients (Pet. App. 17a).

upon petitioners' disclaimer of a higher fee, and the ambiguous nature of the fee agreement. See *Morrison-Knudson Co.* v. *Rocky Mountain Chapter, N.E.C.A.*, 370 F.2d 463, 467 (10th Cir. 1966). Such an essentially factual determination does not merit this Court's review. The court of appeals' further conclusion that neither the settlement agreement nor petitioners' contract with the Godwins provided for an award of costs is of equally limited importance.

Having determined that petitioners were equitably estopped from obtaining additional fees, the court below did not decide when or whether fees based on structured settlements may be awarded.[6] As a result, this case does not provide an appropriate vehicle for addressing the operation of the FTCA's 25% limit on fees in actions involving such settlements.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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[6]The court of appeals expressed "no opinion as to whether [it] would be inclined to follow" the decision in *Robak* v. *United States*, 658 F.2d 471 (7th Cir. 1981), which held that when a portion of a settlement award will be paid in the future the attorney's fee based upon that award may be paid in the present (Pet. App. 13a).

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